

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting the Availability of Diverse and)	MB Docket No. 16-41
Independent Sources of Video)	
Programming)	
)	
)	

**JOINT REPLY COMMENTS OF
THE AMERICAN CABLE ASSOCIATION,
MAVTV MOTORSPORTS NETWORK,
ONE AMERICA NEWS NETWORK AND AWE, AND
RIDE TV**

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SUMMARY

In our initial comments, we compared efforts to promote programming diversity by regulating unconditional MFNs and unreasonable ADMs to attempting to fight a house fire with a Solo cup of water. The vast majority of other independent programmers agreed. They argued that, while MFNs and ADMs are important, addressing forced bundling is far *more* important to their survival.

Perhaps unsurprisingly, the large programmers that engage in forced bundling have a different view of things. They argue that there is no house fire to begin with (*i.e.*, that diversity concerns do not exist). They argue about whether Solo cups do a good job in fighting fires (*i.e.*, that the proposed MFN restrictions are unworkable). And they argue that the fire department shouldn't be fighting fires anyway (*i.e.*, that the Commission lacks authority to act). Each of these arguments is misplaced.

1. Diversity concerns exist.

Large programming conglomerates begin by denying that diversity concerns exist. They claim, for example, that there is no diversity problem because *their own* programming is diverse. An examination of bundled networks, however, casts doubt on such claims. And even if individual conglomerate networks *did* provide a modicum of diversity, relying on a handful of conglomerates as primary providers of “diversity” while foreclosing access to others disserves the public interest.

Others claim that ACA and others exaggerate the role of forced bundling in harming diversity. Specifically, they claim either that forced bundling does not cause capacity constraints or that any such constraints stem from illegitimate “choices” made

by small cable operators to expand broadband service. Such claims cannot be squared with the voluminous evidence already in the record—or with the Commission’s public interest goals in expanding broadband. Yet others claim that online distribution of independent programming is sufficient to serve diversity interests. Independent programmers themselves, however, say that such carriage cannot substitute for traditional “linear” carriage on MVPDs. An examination of the sources for online content cited by programmers supports the independent programmers’ position.

2. Reasonable MFN regulations are worthwhile and administrable.

Large programmers claim that even the Commission’s modest efforts to address so-called “unconditional” MFNs will not work because it is impossible to determine whether a particular MFN is conditioned or not. Respectfully, we think the determination is not so hard. Whether an MFN is conditional or unconditional will, in nearly all cases, be obvious from the text of the provisions itself. While edge cases may prove difficult, we see no reason why the overall rule would be difficult to administer, much less impossible to do so—particularly since the Department of Justice crafted the proposed standard after having reviewed MFN provisions in real-world contracts.

3. The Commission possesses wide authority to act.

Large programmers claim that the Commission is powerless to address the concerns of independent programmers. We disagree. In addition to the program carriage rules identified by the Commission, both the retransmission consent “good faith” negotiation rules (with respect to conduct by broadcasters) and the program access rules (with respect to conduct by vertically integrated programmers) provide ample authority for the Commission to act.

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ONE AMERICA NEWS NETWORK AND AWE, AND
RIDE TV**

The American Cable Association (“ACA”)¹ and independent programmers
MAVTV Motorsports Network,² One America News Network and AWE,³ and RIDE TV⁴
submit these reply comments in connection with the Notice of Proposed Rulemaking

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- ¹ ACA represents nearly 750 small and medium-sized cable operators, incumbent telephone companies, and municipal utilities. ACA members offer broadband Internet access, video, and voice services. These providers offer service to homes and businesses in smaller communities and rural areas, as well as provide competition to incumbent providers in urban and suburban areas.
- ² MAVTV Motorsports Network is an independent, high-definition cable channel owned by Forrest Lucas. MAVTV provides 24-hour motorsports programming, including exclusive coverage of events like The AMA Pro Motocross series and the Lucas Oil Challenge Cup. It produces and televises many grassroots race events that do not receive television coverage elsewhere, and currently reaches 27 million homes.
- ³ One America News Network provides 24-hour coverage of national and international news, including political talk shows and extensive live coverage of political events. AWE provides 24-hour lifestyle and entertainment programming ranging from travel shows to live world championship boxing. Both networks are owned and operated by Herring Networks, Inc., a family-owned independent media company.
- ⁴ RIDE TV is a 24-hour, independent network showcasing the horse culture and lifestyle. Launched in 2014, the network creates 90 percent of its content, which includes documentaries, children’s programming, and coverage of equestrian sports.

(“NPRM”) issued by the Commission in the above-captioned proceeding.⁵ The record makes one thing clear—forced bundling is the single biggest obstacle to a thriving marketplace for independent programming. Large programmers insist on bundling their “must have” programming with a host of undesirable channels, often featuring rehashed content and providing “diversity” in name only, if even that. By doing so, programming conglomerates occupy large amounts of bandwidth that would otherwise go to truly diverse independent programmers. They also eat up programming budgets that otherwise might permit carriage of independent programmers. Coupled with unconditional MFN provisions that hamstring carriage negotiations, bundling creates barriers that many independents cannot overcome, for reasons that have nothing to do with the quality of their programming. Quoting a former MVPD executive, Senator Claire McCaskill of Missouri explained: “[The] unspoken reality is that the MFN, coupled with the tying of services, is what keeps underperforming and unneeded networks in prime channel locations while struggling independents, with genuine grassroots followings, remain off air.”⁶

As explained in detail below, the Commission should acknowledge that reality and act to promote a fair marketplace for video content.

⁵ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Proposed Rulemaking, 31 FCC Rcd. 11352 (2016) (“Notice”).

⁶ Letter from Senator Claire McCaskill to Chairman Ajit Pai, MB Docket No. 16-41, at 11 (Feb. 9, 2017) (“Sen. McCaskill Letter”) (quoting Ken Tolle, *MFN Clause Favors No One in Carriage Negotiations*, Television Week (Mar. 17, 2008)). Unless otherwise indicated, all pleadings cited in this reply were filed in MB Docket No. 16-41.

I. FORCED BUNDLING SHOULD BE THE COMMISSION’S TOP PRIORITY.

The comments filed in this proceeding reveal widespread agreement that the Commission must address forced bundling of unwanted channels to meaningfully aid diverse and independent programming, and the viewers who value such programming. Bundling is the principal concern not just of ACA’s members,⁷ but also of the independent programmers themselves. These include MAVTV, One America News Network, AWE, and RIDE TV, who filed jointly with ACA.⁸ Numerous other independent programmers filed separately to express disappointment that the Commission’s proposed rules did nothing to address bundling.⁹ This all added to a record where

⁷ See Comments of the American Cable Association at 13-26 (filed Mar. 30, 2016) (“ACA NOI Comments”); Reply Comments of the American Cable Association at 6-16 (filed Apr. 19, 2016) (“ACA NOI Reply”).

⁸ Joint Comments of the American Cable Association, MAVTV Motorsports Network, One American New Network and Awe, and RIDE TV (filed Jan. 26, 2017) (“Joint Comments”).

⁹ See Comments of INSP, LLC at 15-16 (filed Jan. 26, 2017) (“INSP Comments”); Comments of NTCA – The Rural Broadband Association at 4-5 (filed Jan. 26, 2017) (“NCTA Comments”); Comments of RFD-TV at 12-13 (filed Jan. 26, 2017) (“RFD Comments”); Comments of ITTA – The Voice of Mid-size Communications Companies at 3-7 (filed Jan. 26, 2017) (“ITTA Comments”); Comments of Cinémoi at 3-4 (filed Jan. 26, 2017) (“Cinémoi Comments”); Comments of beIN Sports, LLC at 9-11 (filed Jan. 26, 2017) (“beIN Sports Comments”); Comments of FUSE Media, Inc. at 4-6 (filed Jan. 26, 2017) (“FUSE Comments”).

bundling was already the primary issue raised in filed comments¹⁰ and the Commission's second workshop on the state of the video marketplace.¹¹

The broad agreement speaks to forced bundling's widespread impact on the market for independent programming. Nearly *all* ACA members experience forced bundling-related constraints of one sort or another.¹² As ACA has noted previously, many members get their programming through the National Cable Television Cooperative buying group ("NCTC"). Even with the benefit of a buying group,

¹⁰ See, e.g. Comments of Outdoor Channel, Sportsman Channel and World Fishing Network at 10-11 (filed Mar. 30, 2016) ("KSE NOI Comments"); Comments of MAVTV Motorsports Network at 2 (filed Apr. 18, 2016) ("MAVTV NOI Comments"); Comments of Ride Television Network at 3 (filed Mar. 30, 2016) ("RIDE NOI Comments"); Comments of Aspire Channel, LLC and UP Entertainment, LLC at 2-3 (filed Mar. 30, 2016) ("Aspire NOI Comments"); Comments of TheBlaze, Inc. at 9 (filed Mar. 30, 2016) ("TheBlaze NOI Comments"); Comments of Hispanic Information and Telecommunications Network, Inc. at 4 (filed Mar. 30, 2016) ("HITN NOI Comments"); Comments of RFD-TV at 20 (filed Mar. 30, 2016) ("RFD NOI Comments"); Comments of the Writers Guild of America, West, Inc. at 3-4 (filed Mar. 30, 2016) ("Writers Guild NOI Comments"); Comments of Free Press at 12 (filed Mar. 30, 2016) ("Free Press NOI Comments").

¹¹ Video recording: Second Media Bureau Workshop on the State of the Video Marketplace, held by the FCC Media Bureau (Apr. 25, 2016), <https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc3> ("FCC Second Workshop"). Panelists who spoke about the problems of bundling included Judy Meyka of NCTC, Heather McCallion of Atlantic Broadband, Chris Kyle of Shentel, Jimmy Todd of Nex-Tech, Daphna Ziman of Cinémoi, Patrick Gottsch of RFD-TV, and Craig Morris of RIDE TV.

¹² Throughout these comments, we refer to facts as reported by ACA members or independent programmers. The programming agreements entered into between ACA members and large programmers—and between independent programmers and large MVPDs—invariably contain stringent confidentiality provisions. See *CBS Corp. v. FCC.*, 785 F.3d 699 (D.C. Cir. 2015). Moreover, both ACA's small cable operator members and independent programmers are understandably concerned about retaliation from large programmers and large MVPDs, respectively. Nonetheless, ACA members and independent programmers can document each of the factual claims made in these comments, and would be pleased to do so if ordered by the Commission and under an appropriate protective order. Also, ACA has worked with the National Cable Television Cooperative ("NCTC") in the preparation of these comments, as ACA members are also members of NCTC. Accordingly, when we refer to factual assertions from "ACA members" herein, we intend to include NCTC even though NCTC itself is not an ACA member.

purchasing desired programming from nine of the largest media groups—Disney/ESPN, Fox, Comcast/NBCU, Turner, Viacom, AETN, AMC, Discovery, and Scripps—requires carriage of at least 65 channels.¹³ This strains both bandwidth and budgets, and frequently eliminates the possibility of carrying independents.¹⁴ It thus came as no surprise to learn that nearly all surveyed NTCA members (98.7%) had been forced to accept content from big programmers they would not otherwise have taken in exchange for the right to carry “must-have” programming.¹⁵ Nor was the fact that 74 percent of NTCA members reported that bundling limits their ability to offer independent programming their subscribers actually want, including content aimed at underserved Native American, rural, or religious audiences.¹⁶

Indeed, a failure to address bundling will likely blunt the positive impact of the Commission’s other proposed rules.¹⁷ While unconditional MFNs can certainly

¹³ ACA NOI Comments at 14-15. NCTC negotiates standardized master agreements with programmers and allows its members to opt into them. Because NCTC acts as an interface between programmers and its members, it allows the programmer to deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, and collecting payments, along with other matters. Programmers benefit from working with NCTC because it reduces their transaction costs of dealing with small and medium-sized MVPDs so that they are comparable to the transaction costs of dealing with a single large MVPD. NCTC members benefit because they receive lower rates (sometimes significantly lower) than they would receive through direct deals, although the rates even NCTC can negotiate remain higher than those negotiated by the largest MVPDs in the market.

¹⁴ Indeed, as the Senate Subcommittee on Investigations found, “even when independent channels manage to gain carriage on an MVPD’s system, they tend to receive subscriber fees far below those received by channels that receive fewer viewers, but that are associated with a large media company, and may have been negotiated as part of a bundle.” Sen. McCaskill Letter at 12. Bundled channels receive an unearned advantage even when subscribers clearly indicate their preference for other content.

¹⁵ NTCA Comments at 4.

¹⁶ *Id.* at 3, 5.

¹⁷ Joint Comments at 4-10.

hamstring independents as they negotiate with MVPDs, these negotiations cannot even begin if capacity constraints caused by bundling mean the MVPD cannot carry the channel under any offered terms.¹⁸ And while unreasonable ADM provisions can undermine the promise online distribution holds for independent programmers, reforms of these provisions will do little if independent programmers cannot succeed where their core financial opportunities still lie: traditional MVPD platforms.¹⁹ beIN Sports described the situation well: “The Commission must address conglomerate programmers’ bundling practices as part of any effort to improve competition in the video market. A failure to do so would eviscerate any other reforms adopted in this proceeding.”²⁰

II. THE ARGUMENTS AGAINST BUNDLING REFORM DEFY THE RECORD IN THIS PROCEEDING.

The only backers of forced bundling are, predictably, the entities that benefit from foisting their unwanted channels on MVPDs: large conglomerates or trade associations representing large conglomerates.²¹ Their arguments, however, cannot be squared with the record in this proceeding.

A. Bundled Networks Are Insufficient to Meet Diversity Imperatives.

Commenters arguing for Commission inaction assert that bundling *contributes* to programming diversity, rather than detracting from it. A coalition of the biggest

¹⁸ *Id.* at 7-9.

¹⁹ *Id.* at 9.

²⁰ beIN Sports Comments at 11.

²¹ See Comments of Comcast Corporation and NBCUniversal Media, LLC at 40-41 (filed Jan. 26, 2017) (“Comcast Comments”); Comments of CBS Corporation, The Walt Disney Company, Time Warner Inc., 21st Century Fox, Inc., and Viacom Inc., at 3-6 (filed Jan. 26, 2017) (“Big Programmer Comments”); Comments of the National Association of Broadcasters at 2-3 (filed Jan. 26, 2017) (“NAB Comments”).

programmers assert, for example, that bundling “is critical to programmers’ ability to bring innovative content to market, and to ensuring that niche, minority, or otherwise underserved audiences receive the programming they want and need.”²² Comcast likewise praises forced bundling as a tool for conglomerated programmers to expand carriage for “new, untested programming with special appeal to diverse audiences.”²³

This dubious contention is wrong for many reasons. To begin with, it appears exaggerated at best. The chart below lists a randomly selected day’s programming on several of the less desirable networks offered by large programming conglomerates. It identifies what programming is original to the network, as well as what new content aired on that day.²⁴

²² Big Programmer Comments at 5; see *also* NAB Comments at 3.

²³ Comcast Comments at 40.

²⁴ Counsel for ACA collected this information, as well as the information in the following chart (related to independent programmers), by visiting the websites of the channels in question on or about the dates listed in the respective charts.

Channel (Tuesday Jan. 31)	DIY Network (US)	FXX (US)	IFC (US)	MTV2 (US)	WE tv (US)
Conglomerate Programmer	Scripps	21st Century Fox	AMC	Viacom	AMC
12AM	Holmes and Holmes	Next	That '70s Show	Martin	CSI: Miami
1AM	Holmes and Holmes		That '70s Show	Martin	CSI: Miami
2AM	Holmes Makes It Right	Paid Programming	That '70s Show	Martin (.5hr) The Jamie Foxx Show (.5hr)	CSI: Miami
3AM	Holmes and Holmes		That '70s Show (.5hr) Ghostbusters II (.5hr)	The Jamie Foxx Show	CSI: Miami
4AM	Holmes and Holmes (.5hr) Rescue My Renovation (.5hr)		Ghostbusters II	MTV2 Music Mix	CSI: Miami
5AM	Rescue My Renovation		Ghostbusters	MTV2 Music Mix	
6AM				MTV2 Music Mix	
7AM	Leave It To Bryan (.5hr) Elbow Room (.5hr)	Mad About You	Ghostbusters	MTV2 Music Mix	Paid Programming
8AM	Elbow Room (.5hr) Holmes: Buy It Right (.5hr)	Anger Management		Ghostbusters II	
9AM	Holmes: Buy It Right	Raising Hope	Ghostbusters II	Catfish	
10AM	Holmes: Buy It Right	Parks and Recreation		Catfish	
11AM	Holmes: Buy It Right	Paranormal Activity 2	Jennifer's Body	Catfish	
12PM	Holmes Makes It Right			Paranormal Activity 2	Ridiculousness
1PM	Holmes Makes It Right	Paranormal Activity 3	Ghostbusters	Catfish	Law and Order: Criminal Intent
2PM	Holmes Makes It Right			Nick Cannon Presents: Wild 'n Out (.5hr)	Catfish (.5hr) Nick Cannon Presents: Wild 'n Out (.5hr)
3PM	Holmes Makes It Right		Next	Ghostbusters (.5) Ghostbusters II (.5hr)	Nick Cannon Presents: Wild 'n Out
4PM	Holmes Makes It Right	Ghostbusters II		Nick Cannon Presents: Wild 'n Out	Law and Order: Criminal Intent
5PM	Holmes Makes It Right	The Karate Kid	Ghostbusters II	Nick Cannon Presents: Wild 'n Out (.5hr) My Wife and Kids	Law and Order: Criminal Intent
6PM	Holmes Makes It Right		That '70s Show	My Wife and Kids	Law & Order
7PM	Holmes and Holmes		That '70s Show	My Wife and Kids	Law & Order
8PM	Holmes and Holmes		The Simpsons	That '70s Show	Law & Order
9PM	Holmes and Holmes		The Simpsons	That '70s Show	Law & Order
10PM	Holmes and Holmes (NEW)	The Simpsons	That '70s Show	My Wife and Kids	Law & Order
11PM	Holmes Makes It Right	The Simpsons	That '70s Show	My Wife and Kids	Law & Order

Key:

Non-original Programming

At Least Some Original Programming

At Least Some New Content

The “new, untested programming with special appeal to diverse audiences” promised by Comcast is missing. In its place is dated, secondhand content. For example, WeTV offers nothing on a representative day except for paid programming and long marathons of *CSI: Miami*, *Law & Order*, and *Law & Order: Criminal Intent*, none of which have aired a new episode in over four years. MTV2 largely fills its day with re-aired programming that once appeared on its owner’s more popular channel, MTV. Moreover, it is hard to see how these bundled channels hold any “special appeal to diverse audiences.”²⁵ IFC’s six-hour marathon of *That ’70s Show*, for example, serves the same mainstream audience the show targeted when it aired on Fox in the 90s and early 2000s, an audience that remains served by the mainstream sitcoms airing today. In many cases, bundled channels are less about providing diversity and more about squeezing the last ounce of financial value from dated content.

For comparison, below is a randomly selected day’s programming from independent channels, all of whom have filed comments in this proceeding attesting to the detrimental impact of forced bundling:

²⁵ Comcast Comments at 40.

Channel (Tuesday Feb. 7)	AWE	MAVTV	One America News Network	Outdoor Channel	RIDE TV	RFD-TV
12AM	Private Islands (5hr) Private Islands (5hr)	Gearz (5hr) Wrench Wars: Custom Trucks (5hr)	The Daily Ledger	Backcountry Rescue (5hr) Wardens presented by Streamlight (5hr)	FEI Equestrian World (5hr) FEI Awards Show 2016 (5hr)	Rural America Live (NEW)
1AM	Live Here, Buy This (5hr) Live Here, Buy This (5hr)	TTM American Built	One America News	Wardens presented by Streamlight (5hr) Alaska's Ultimate Bush Pilots (5hr)	Road Star Vets	The American Rancher (5hr) Red Shagall! Somewhere West of Wall Street (5hr)
2AM	Travel in Style (5hr) Travel in Style (5hr)	Dangerous Waters	Tipping Point	Carter's W.A.R. (Wild Animal Response)	Paid Programming	Product Showcase - Paid Programming
3AM	Private Islands (5hr) Private Islands (5hr)	Gearz (5hr) Chop Cut Rebuild (5hr)	The Daily Ledger	Flying Wild Alaska	Paid Programming	
4AM	Classical Destinations (5hr) Classical Destinations (5hr)	Chop Cut Rebuild (5hr) Dream Rider (5hr)	One America News	Alaska's Ultimate Bush Pilots (5hr) Wardens presented by Streamlight (5hr)	Paid Programming	
5AM	Wildlife	Search for the Ultimate Street Car - The Series	One America News	Nick's Wild Ride (5hr) Gold Fever (5hr)	Larry King Special Report (5hr) Paid Programming (5hr)	The Bailey & Vincent Show (5hr) Presley's Country Jubilee (5hr) The Best of The Marty Stuart Show (5hr) Rural Evening News (5hr) (NEW)
6AM	Wealth on the Water (5hr) WOW (5hr)	Paid Programming	One America News	Carter's W.A.R. (Wild Animal Response)	The Ride: Race Across the Steppe	
7AM	Wildlife	Paid Programming	One America News	L.L. Bean Guide to the Outdoors (5hr) Alaska Outdoors Television (5hr)	This Old Horse	
8AM	Wild Ones: Superseries (5hr) Secret Life of... (5hr)	American Spring Boat Racing	One America News	Western Extreme (5hr) Heartland Bowhunter (5hr)	Stable Fables (5hr) Lone Ranger (5hr)	Ag Day (5hr) American Farmer (5hr)
9AM	Special Species (5hr) LUX Lifestyle (5hr)	FIA World Rally Championship Racing	One America News	The Choice with Ralph & Vicki (5hr) GO Wild Camo's Gridiron Outdoors with Mike Pawlowski (5hr)	Horses That Heal	Market Day Report (Live Reporting)
10AM	Private Islands (5hr) Selling Jets (5hr)	British Rallycross	One America News	SnowTrax Television (5hr) Added to the Outdoors presented by Mathews (5hr)	Southern Fried Skinnified (5hr) Ride On the Road (5hr)	
11AM	Tales of Castles and Kings	Drag Boat Racing Series	One America News	The Gunfather presented by Brownell's (5hr) Gun Stories presented by MidwayUSA (5hr)	Equestrian	
12PM	One America News (5hr) World Heritage (5hr)	F4 British Championship (5hr) On the Edge (5hr)	One America News	Bigwater Adventures with Mark Davis (5hr) (NEW) The Obsession of Carter Andrews (5hr)	The Saddle Club (5hr) Swamp Donkey (5hr)	
1PM	Classical Destinations (5hr) Secret Life of... (5hr)	AMA Supermoto (5hr) AMA Supermoto (5hr)	One America News	Wardens presented by Streamlight (5hr) Alaska's Ultimate Bush Pilots (5hr)	Equestrian	Clinton Anderson Downunder Horsemanship
2PM	Wildlife	U.S. Modified Touring Series	One America News	Gold Fever (5hr) Buck Commander: Protected by Under Armour (5hr)	Lone Ranger (5hr) Southern Fried Skinnified (5hr)	
3PM	Special Spaces (5hr) LUX Lifestyle (5hr)	Modified Series	One America News	Shooting USA (NEW)	Stable Fables (5hr) Jumping with Brittni (5hr)	Chris Cox Horsemanship (5hr) TCR Classics (5hr)
4PM	Private Islands (5hr) Secret Meat Business (5hr)	AMA Supermoto (5hr) AMA Supermoto (5hr)	One America News	Cabela's American Archer (5hr) Territories Wild with Tom Miranda presented by Mathews (5hr) (NEW)	Swamp Donkey (5hr) The Saddle Club (5hr)	Virginia Farming (5hr) (NEW) Rural Heritage (5hr)
5PM	One America News (5hr) Enigunity (5hr)	U.S. Modified Touring Series	One America News	Western Extreme (5hr) Michael Waddell's Bone Collector (5hr) (NEW)	It's My Backyard (5hr) It's My Backyard (5hr)	Machinery Pete TV (5hr) (NEW) Macum Auctions Gone Farmin' (5hr) Macum Auctions Gone Farmin' (5hr)
6PM	Boys Toys (5hr) WOW (5hr) (NEW)	AMA Pro Flat Track	One America News	Trophy Hunters TV (5hr) (NEW) Primos Truth About Hunting (5hr) (NEW)	The Ride: Race Across the Steppe	The Jimmy Dean Show (5hr) The Jimmy Dean Show (5hr)
7PM	Wildlife (5hr)	Off Road Racing Series	One America News	Greg Zipadelli's Drop Zone (5hr) Gun Dog TV - Presented by CZ-USA (5hr)	Ride Documentaries: Miniature Horse	Rural Evening News (5hr) (NEW)
8PM	Wild Ones: Superseries (5hr) Secret Life of... (5hr)	Pro Pulling League	The Daily Ledger	Chris Brackett's Fear No Evil presented by Mossy Oak (5hr) Ted Nugent Spirit of the Wild (5hr) (NEW)	This Old Horse	Ag PhD (5hr) (NEW) Cattlemen to Cattlemen (5hr) (NEW)
9PM	Special Spaces (5hr) LUX Lifestyle (5hr)	AMA Pro Flat Track	Tipping Point	Mossy Oak's Hunting the Country (5hr) (NEW) Driven with Pat & Nicole (5hr)	Thousand to One	Cattlemen to Cattlemen (5hr) (NEW) NTPA Championship Pulling (5hr) (NEW)
10PM	Private Islands (5hr) Selling Jets (5hr)	Off Road Racing Series	One America News	Rain Outdoorsman (5hr) (NEW) Trophy Hunters TV (5hr)	Unbridled Song	Clinton Anderson Downunder Horsemanship
11PM	Tales of Castles and Kings	Pro Pulling League	One America News	DSC Tracks Across Africa (5hr) (NEW) Primos Truth about Hunting (5hr)	FEI Awards Show 2016 (5hr) Equestrian (5hr)	Chris Cox Horsemanship (5hr) Rural Evening News (5hr) (NEW)

Key:

Non-original Programming

At Least Some Original Programming

At Least Some New Content

The difference could not be starker. Independent programming lineups are dominated by programming unique to the channel, rather than warmed-over content that once aired elsewhere. New episodes are a prominent feature of the independents' daily lineups, whereas they are almost nonexistent on the unwanted bundled channels. The Outdoor Channel, for example, aired 23 hours of original programming on the representative day, including eight hours of new episodes spanning almost the entire afternoon and evening. These channels not only contribute to programming diversity by significantly contributing new content, but also by specifically targeting niche audiences. Independent channels speak to African American audiences (Aspire), fans of international sports (beIN Sports), recreational fishermen (World Fishing Network), and motorsports fans (MAVTV), among many others.

Even if conglomerate networks did feature more inventive programming, moreover, the Commission itself has recognized that diversity requires not just a lot of content, or even a variety of content, but a variety of content *selected by a variety of voices*.²⁶ As INSP aptly put it, “[T]he availability of a large number of channels, even if they covered every conceivable programming niche, would not fulfill Congress’ goal when the overwhelming majority of those channels are owned or controlled by a handful of media conglomerates.”²⁷ Large programmers cannot be entrusted with the role of diversity gatekeepers, deciding on the programming that millions of Americans will watch. “Diversity” provided only by the likes of Comcast, Viacom, and Disney is not diversity at all.

²⁶ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610, ¶ 2 (2016) (“NOI”).

²⁷ Comments of INSP, LLC at 9 (filed Mar. 30, 2016) (“INSP NOI Comments”).

B. Capacity Constraints Are Real.

As it did in response to the Commission's *Notice of Inquiry*, the National Association of Broadcasters ("NAB") dismisses the idea that bundling may cause capacity constraints that harm independent programmers.²⁸ This claim is a little rich from an industry that enjoys MVPD carriage guaranteed by law—no matter how unoriginal or unwanted its product may be.²⁹ Rather than supporting its claim with evidence, moreover, NAB tries to move the bar for what constitutes a capacity constraint. Thus, according to NAB, the Commission should be troubled only if "AT&T/DirecTV, Verizon and Time Warner Cable/Charter/Bright House lack relevant capacity, not [if] an MVPD serving under 1,000 subscribers in rural Montana has limited capacity."³⁰ This seems to us to be the opposite of what the standard should be. Capacity constraints exist even if some of the largest and best-funded providers have managed to overcome them in some instances. In particular, we do not share NAB's disregard for whether consumers relying on small cable operators get diverse programming.³¹ Nor, for that matter, does the Commission.³²

²⁸ See NAB Comments at 5-6.

²⁹ See 47 U.S.C. §§ 534-35, 338.

³⁰ NAB Comments at 6. Tellingly, NAB did not feel that small cable systems were inconsequential in 2015, when it argued that they should be *required by law* to carry broadcast signals in HD. Comments of the National Association of Broadcasters, CS Docket No. 98-120, at 9-10 (filed Apr. 16, 2015). NAB and ACA subsequently agreed to a joint compromise proposal on the HD exemption, which the Commission adopted. *Carriage of Digital TV Broad. Signals: Amend. to Part 76 of the Commission's Rules*, 30 FCC Rcd. 6653 (2015).

³¹ Though apparently too small for NAB's consideration, ACA members (more than half of which serve fewer than 1,000 subscribers each) pass nearly 19 million homes in all 50 states and many U.S. territories, and serve about 7 million of them.

³² For example, the Commission recognized the importance of maintaining the viability of small cable operators in extending the HD exemption. *Carriage of Digital TV Broad. Signals:*

As for the evidence, ACA has submitted materials showing that capacity constraints are real and represent a significant barrier to independent programming reaching viewers. As Chris Kyle, the Vice President of Industry Relations & Regulatory at Shentel, stated in a sworn declaration, “We would love to see how subscribers respond to new, independent channels, but because our capacity is taken up by bundled channels, it is not economically feasible. Capacity constraints have led us not to carry multiple independent channels.”³³ These constraints exist despite the fact that Shentel has invested heavily to improve its systems.³⁴ Judy Meyka, Executive Vice President of Programming at NCTC, similarly declared that NCTC’s members are frequently unable to carry desired independent programming, because unwanted bundled channels create capacity constraints.³⁵ Indeed, the record is full of comments making the same point ACA has made: bundling reduces available capacity.³⁶

Amend. to Part 76 of the Commission's R., 27 FCC Rcd. 6529, 6547–48 (2012) (noting the importance of small cable operators to serving consumers, particularly those in rural and smaller markets); see also Sixth Report and Order at 6653 (concluding that a modified HD exemption for small cable operators still served the public interest). The Commission has also taken care to inquire into particular burdens small cable operators face. See, e.g., *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd. 6574, ¶ 25 (2015) (describing particular need for revision of the effective competition rules for small cable operators); *Notice* ¶ 4 (inquiring “whether independent networks encounter greater challenges in securing carriage on certain MVPDs relative to others (e.g., small vs. large MVPDs)”).

³³ ACA NOI Reply, Exhibit B, Declaration of Chris Kyle, ¶ 5.

³⁴ *Id.*, ¶¶ 3-4.

³⁵ ACA NOI Reply, Exhibit A, Declaration of Judy Meyka, ¶¶ 4, 6-7 (“Meyka Declaration”).

³⁶ See, e.g. KSE NOI Comments at 10-11; Aspire NOI Comments at 2-3; HITN NOI Comments at 4; RFD NOI Comments at 20; see also *id.* at 9 (describing MVPDs that have dropped RFD, including Frontier, Wild Open West, and Cable One).

NAB also argues that MVPDs cannot truly claim to have limited capacity if they have decided to treat expansion of their broadband capacity as an important priority.³⁷ Of course, in the real world, all MVPDs—including small cable operators—have to make choices about how to allocate finite capacity. NAB appears to think that the only legitimate choice is to reserve as much capacity for broadcasters as they might desire—and to ignore other competing programming and services entirely. We are not surprised: broadcasters say the same thing in real-world carriage negotiations. As Judy Meyka has recounted, NCTC members have faced demands from programmers that they “reallocate bandwidth from their broadband offering to their video offering solely for the purposes of carrying the programmer’s additional low rated networks.”³⁸

NAB’s proposed “broadcasters first” approach, moreover, conflicts with important public policy prerogatives. Promoting broadband deployment is one of Congress’ and the Commission’s most important goals,³⁹ and the Commission has recognized the

³⁷ NAB Comments at 6.

³⁸ Meyka Declaration, ¶ 5.

³⁹ Remarks of FCC Commissioner Ajit Pai at the Brandery : A Digital Empowerment Agenda, at 2-3 (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf; Remarks of FCC Commissioner Ajit Pai at the Federal Communications Commission (Jan. 24, 2017), <https://www.fcc.gov/document/chairman-pai-remarks-federal-communications-commission>; Letter from Co-Chairs of House Rural Broadband Caucus and Colleagues to President Donald Trump (Jan. 30, 2017), http://welch.house.gov/sites/welch.house.gov/files/Telecom%202017.01.30%20Letter%20to%20Pres%20Trump%20re.%20broadband_0.pdf (urging President to invest in infrastructure to improve broadband connectivity for rural America); *Klobuchar, Capito, King, Heitkamp, Boozman Lead 48 Senators in Urging President Trump to Include Broadband in Any Infrastructure Initiative*, WEBSITE OF SENATOR AMY KLOBUCHAR (Jan. 31, 2017), <https://www.klobuchar.senate.gov/public/index.cfm/2017/1/klobuchar-capito-king-heitkamp-boozman-lead-48-senators-in-urging-president-trump-to-include-broadband-in-any-infrastructure-initiative> (joining House colleagues in urging President to include funds to improve broadband access in infrastructure initiatives).

importance of online video to expanding consumers' viewing options.⁴⁰ Indeed, one thing proponents and opponents of Commission action in this proceeding generally can agree on is the tremendous potential online programming offers for improving programming diversity. Moreover, as ACA has previously noted, small cable operators are increasingly facing diminishing or disappearing margins due to video programming costs.⁴¹ They are transitioning to broadband-centric models both to maintain viability and to meet the changing tastes of their customers.⁴² NAB cannot reasonably expect otherwise.

In effect, big programmers argue that bundling does not present a problem worth the Commission's attention unless MVPDs have devoted every bit of bandwidth they have to bundling, even if it means putting their own financial futures at risk, giving their subscribers an inferior channel lineup, and shortchanging their subscribers when it comes to broadband. The Commission need not expect such sacrifices before it takes regulatory action.

⁴⁰ Remarks of FCC Commissioner Ajit Pai at the Churchill Club at 1-2 (July 17, 2015) (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-334437A1.pdf.

⁴¹ ACA NOI Comments at 8-13. As Wave Broadband's CEO put it, while the company continues to sell traditional cable packages, one of its most popular offerings today is "a broadband connection and a Roku box," and it now focuses on "what [it] can do to help customers get online, go get content directly from the content owner and pay that content owner directly." *Id.* at 10.

⁴² See Mike Farrell, *Cable One Stock Rides NewWave*, MULTICHANNEL NEWS, ¶ 5 (Jan. 18, 2017), <http://www.multichannel.com/news/cable-operators/cable-one-stock-rides-newwave/410278> ("Cable One has embarked on a "broadband-centric" strategy over the past few years, focusing on broadband customer growth instead of video subscriber gains.").

C. OTT Carriage Is Not Yet a Substitute for Traditional MVPD Carriage.

The Commission has a statutory duty to foster a diverse marketplace for the delivery of *multichannel video programming*.⁴³ Large programmers, however, insist that worrying about diversity on MVPDs is “anachronistic” due to the possibility of online distribution.⁴⁴ This is easy for them to say. While many of them offer their programming online in one way or another, none of them rely exclusively on online carriage. One expects, moreover, that online carriage remains a comparatively small part of their businesses.

Independent programmers, by contrast, face the very real possibility that they might have to rely solely on online carriage. *They* say that online distribution does not yet represent a viable alternative.⁴⁵ It is not hard to see why. Comcast heaps praise on the promise of sites like Youtube, and these sites do represent a welcome vehicle for amateurs and hobbyists to get attention for their creative product. From an economic perspective, however, these sites simply cannot compare to MVPD carriage. Youtube offers creators an average of \$1 per 1,000 views,⁴⁶ and while creators can use branded content or fundraising to make additional money, even very popular video creators

⁴³ See NOI ¶ 2 (collecting authority).

⁴⁴ Comcast Comments at 6-8.

⁴⁵ See INSP NOI Comments at 15; Reply Comments of Public Knowledge at 7-8 (filed Apr. 19, 2016).

⁴⁶ Maddy Kadish, *The Business of Web Series: What are the Returns on Online Episodic Content – Monetary or Otherwise?*, MOVIEMAKER (July 22, 2016), <http://www.moviemaker.com/archives/summer2016/business-of-web-series-online-serial-content/> (“MovieMaker Article”).

rarely earn enough from their videos to make ends meet.⁴⁷ Because of these economic limitations, making any profit often depends on “low overhead and little production value,” hardly a recipe for content that can meaningfully substitute for conventional television.⁴⁸

This explains why one finds very few true linear networks operating online. Comcast, for example, highlights PewDiePie to demonstrate online video’s promise.⁴⁹ Even putting aside the Swedish producer’s recent controversies,⁵⁰ however, a glance at his spirited playthroughs of video games make clear that his videos are at best an entertaining addition to the content available to viewers, not a real substitute for the television shows offered by independent programmers.⁵¹ Indeed, an article collecting four case studies of web series found bare-bones budgets and earnings that were either

⁴⁷ Gaby Dunn, *Get rich or die vlogging: The sad economics of internet fame*, FUSION (Dec. 14, 2015), <http://fusion.net/story/244545/famous-and-broke-on-youtube-instagram-social-media/>.

⁴⁸ *Id.*

⁴⁹ Comcast Comments at 8.

⁵⁰ Todd Spangler, *YouTube Cancels PewDiePie Show, Pulls Channel From Ad Program After His ‘Death to All Jews’ Stunt*, VARIETY (Feb. 14, 2017), <http://variety.com/2017/digital/news/youtube-cancels-pewdiepie-pulls-ads-death-to-jews-1201987810/>

⁵¹ See, e.g., PewDiePie, *Good Game*, YOUTUBE (Feb. 8, 2017), <https://www.youtube.com/watch?v=1keE74XCZTY>. Comcast also highlights Louis C.K.’s innovative effort to sell his show *Horace and Pete* directly to consumers on his website. Comcast Comments at 8. It neglects to note that C.K. was still in the red months after the show first aired, and that he undertook the project comfortable with the idea that it might lose money. Anthony D’Alessandro, *Louis C.K. On Potential ‘Horace and Pete’ Season 2: ‘I Have Ideas On How to Continue The Series,’* DEADLINE HOLLYWOOD (June 16, 2016) <http://deadline.com/2016/06/louis-c-k-horace-and-pete-season-2-1201773539/> (quoting C.K. as stating that the show’s “mandate was never to make money”). While it is good that the internet provides a way for people like C.K. to innovate, a method of distribution that is at best an experiment for even a six-time Emmy winner like C.K. is not one that provides a reasonable substitute for traditional carriage.

negligible or nonexistent.⁵² As the article explained, “most series creators seem to hope that a larger, traditional distributor eventually picks up their work, developing it into a full TV show or feature.”⁵³ It seems even those making online content do not share bundling supporters’ faith that traditional carriage is an anachronism.

III. REASONABLE MFN REGULATIONS ARE WORTHWHILE AND ADMINISTRABLE.

Though not as significant a problem as bundling, unconditional MFNs by large MVPDs can also foil efforts by independent programmers to gain wider carriage.⁵⁴ Independent programmers commonly tell ACA members that they cannot accept proposed terms, since any favorable terms they might offer would be automatically applied to the programmer’s deals with large MVPDs, without the large MVPDs taking on any new obligations in exchange.⁵⁵ Based on analysis by the Senate Subcommittee on Investigations, Senator McCaskill agrees, stating that unconditional MFN clauses may be limiting consumers’ choices for viewing content.⁵⁶

As ACA has explained in detail, the Commission should (1) modify its rules to restrict unconditional MFNs involving *all* video programming vendors, not just independent video programming vendors;⁵⁷ (2) exclude from the regulation small

⁵² See MovieMaker Article.

⁵³ *Id.*

⁵⁴ Joint Comments at 11-12.

⁵⁵ *Id.*

⁵⁶ Sen. McCaskill Letter at 1.

⁵⁷ *Id.* at 12-14.

MVPDs, absent evidence to suggest they are a source of draconian MFNs;⁵⁸ and (3) examine unconditional MFNs demanded by broadcasters.⁵⁹ With those provisions, however, ACA supports the Commission's proposed reform.

Comcast suggests that any such reform would be unworkable, because it is impossible to distinguish between unconditional MFNs and conditional MFNs.⁶⁰ We do not find the distinction so difficult to make. The NPRM defines an unconditional MFN as:

“a provision that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor's agreement, and with which the MVPD can reasonably comply technologically and legally.”⁶¹

In nearly all cases, whether an MFN falls within this definition will be obvious from the text of the provision itself—and Comcast's example notably failed to include any text at all.⁶² Moreover, the Commission's language comes from the Department of Justice's proposed judgment regarding the Charter Communications-Time Warner Cable

⁵⁸ *Id.* at 14-16. Indeed, Senator McCaskill noted that large MVPDs are particularly responsible for MFNs, and that smaller MVPDs are usually unable to secure MFNs in their agreements with programmers. Sen. McCaskill letter at 8-9, 13. Senator McCaskill's conclusion is especially compelling, as she based it on subcommittee interviews with programmers and MVPDs, along with reviews of subpoenaed carriage contracts to which even the Commission does not typically have access. *Id.* at 2-3; John Eggerton, *Senate Subcommittee Eyes Fall Wrap-Up for MVPD Investigation*, MULTICHANNEL NEWS (June 23, 2016), <http://www.multichannel.com/news/congress/senate-subcommittee-eyes-fall-wrap-mvpd-investigation/405903>. Her analysis matches the experience of ACA's members, and demonstrates again that restricting MFN negotiations by smaller MVPDs is unnecessary.

⁵⁹ Joint Comments at 16-17.

⁶⁰ Comcast Comments at 17-20.

⁶¹ Notice ¶ 18.

⁶² Comcast Comments at 18.

transaction.⁶³ The DOJ, which presumably crafted this formulation with access to a variety of real-world MFNs, concluded that the drawing the line between conditional and unconditional provisions was straightforward. While edge cases may raise some complications, we see no reason to think that the Commission could not readily resolve them in a complaint proceeding.

IV. THE COMMISSION HAS A WIDE RANGE OF AUTHORITY TO ACT.

For the reasons documented extensively in the record, action by the Commission is critical to ensure that independent programmers have a fair chance at gaining carriage. The Commission has already identified authority to act pursuant to Section 616.⁶⁴ Additionally, as ACA has noted before, the Commission also has other sources of authority for regulating anti-competitive behavior like bundling and unconditional MFNs.⁶⁵

Our initial comments noted the bundling practices of broadcasters.⁶⁶ The Commission can address such bundling through revisions to the good-faith rules.⁶⁷ ACA and the American Television Alliance (of which ACA is a member) have previously submitted detailed comments about the ways aggressive bundling demands violate the good faith rules, and proposals for the Commission to recognize some bundling

⁶³ [Proposed] Final Judgment at 5, *United States v. Charter Communications, Inc. et al.*, No. 1:16-cv-00759-RCL (D.D.C. Aug. 31, 2016), ECF No. 11-2; see also *Notice* ¶ 18 n.81 (noting the source of the Commission's language).

⁶⁴ *Notice* ¶¶ 34, 37-38.

⁶⁵ ACA NOI Reply at 25-29.

⁶⁶ Joint Comments at 16 ("In particular, broadcasters routinely insist on unconditional MFNs regarding multicast carriage with ACA members.").

⁶⁷ 47 C.F.R. § 76.65.

practices as *pre se* violations of the duty to negotiate in good faith.⁶⁸ These bad faith practices include a broadcaster insisting on bundling broadcast signals with RSNs or other “must have” programming in retransmission consent negotiations, refusing to negotiate sequentially for “must have” programming, and insisting on carriage of unlaunched programming networks.⁶⁹

Specifically, ACA has demonstrated that some forms of bundling lead to higher prices that are not consistent with competitive marketplace considerations. By bundling together two or more “must have” programming assets, such as a regional sports network and a major broadcast station, a broadcaster can obtain higher prices than the assets would merit on their own.⁷⁰ The higher programming costs limit the budget MVPDs have available for independent programming.⁷¹ Consumers not only get an inferior programming lineup, but also wind up paying more for it, since at least some of the higher programming costs are passed on to them.⁷² The Commission has repeatedly acknowledged the competitive harms that bundling of two “must have” programming assets can cause.⁷³

⁶⁸ See, e.g., Comments of the American Cable Association, MB Docket No. 15-216, at 14 (filed Dec. 1, 2015) (“ACA Good Faith Comments”); Comments of the American Television Alliance, MB Docket No. 15-216, at 44-47 (filed Dec. 1, 2015) (“ATVA Good Faith Comments”).

⁶⁹ ACA Good Faith Comments at 26-80.

⁷⁰ ACA NOI Comments at 22-26; ACA Good Faith Comments at 26-32.

⁷¹ ACA NOI Comments at 24.

⁷² ACA Good Faith Comments at 27.

⁷³ See *Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, App. B. ¶¶ 54-57 (2011); *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 14 (2014).

At a minimum, the Commission could eliminate bundling from the list of conduct that is presumptively consistent with good faith conduct.⁷⁴ Seventeen years ago, the Commission justified treating bundling as presumptively good-faith conduct on the grounds that it did “not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel . . . is impermissible or other than a competitive marketplace consideration.”⁷⁵ Even if that assessment of bundling practices was once accurate, the record in this proceeding reflects that it is certainly not now. If bundling were ever a “request,” that is a thing of the past. Rather, it is invariably a take-it-or-leave-it demand from programmers, and programmers regularly refuse to provide standalone rates for desired channels.⁷⁶ These practices have real anti-competitive implications, making it more difficult for channels not affiliated with a large programmer to obtain carriage.

Our initial comments also described anticompetitive conduct engaged in by vertically integrated programmers (among others).⁷⁷ The Commission can also exercise its authority to regulate vertically integrated programmers pursuant to the program access rules, which are designed among other things “to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market.”⁷⁸ The statute makes it unlawful for vertically

⁷⁴ *Implementation of the Satellite Home Viewer Improvement Act of 1999 Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, ¶ 56 (2000) (“2000 Good Faith Order”).

⁷⁵ *Id.*

⁷⁶ See ACA NOI Comments at 16-18; ACA NOI Reply at 6-8; Meyka Declaration ¶ 3.

⁷⁷ Joint Comments at 20.

⁷⁸ 47 U.S.C. § 548(a).

integrated programmers to engage in methods of competition or unfair acts that hinder MVPDs from providing programming to subscribers or consumers.⁷⁹ Congress explicitly gave the Commission broad authority to effectuate this provision, identifying only the “[m]inimum contents of regulations” the Commission should adopt.⁸⁰ As extensively demonstrated in this proceeding, practices like bundling and insisting on unconditional MFNs detract from competition and diversity in the market by hobbling independent programmers’ efforts to gain carriage. Vertically integrated programmers are among the perpetrators of these anti-competitive practices, and regulations accordingly fall straightforwardly within the Commission’s authority under Section 628.⁸¹

Comcast asserts that Section 628 does not grant the Commission authority to regulate MFN and ADM provisions, arguing that Section 628 concerns only *seller-side* conduct (affecting competing MVPDs), while Section 616 is the exclusive source of

⁷⁹ 47 U.S.C. § 548(b). The statute only explicitly applies to practices that hinder MVPDs from providing satellite cable programming or satellite broadcast programming to subscribers or consumers, but in 2010 the Commission established rules to address unfair acts involving *terrestrially* delivered, cable-affiliated programming as well. See *Rev. of the Commission’s Program Access R. and Exam. of Programming Tying Arrangements*, 25 FCC Rcd. 746, 747 (2010); see also *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 699 (D.C. Cir. 2011) (upholding expansion of rules to terrestrially delivered programming).

⁸⁰ 47 U.S.C. § 548(c)(2).

⁸¹ Additionally, as ACA has noted before, the Commission should update its program access rules to allow NCTC—the buying group used by more than 800 small and medium-sized cable operators—to bring complaints. As ACA has explained, out-of-date rules allow “buying groups” to bring complaints, but do not allow NCTC to do so. See, e.g., Comments of the American Cable Association, MB Docket No. 12-68 (filed Dec. 17, 2012). NCTC, which is primarily responsible for negotiating with programmers on behalf of small cable companies, is uniquely positioned to raise issues with the negotiating practices of cable-affiliated programmers, but the Commission’s current rules effectively bar them, and by extension hundreds of small MVPDs who rely on them to negotiate their contracts, from doing so.

authority to regulate buyer-side conduct (affecting programmers).⁸² A “seller-side” limitation appears nowhere in Section 628, which by its terms applies its prohibitions both to “cable operators,”⁸³ and vertically integrated programmers—and, as courts have held, gives the Commission broad regulatory authority.⁸⁴ Even were Comcast’s interpretation correct, its reading would still give the Commission authority under Section 628 to regulate seller-side conduct like bundling, and would likely give it authority to regulate unreasonable MFNs, which (as ACA has repeatedly demonstrated) negatively affect MVPDs even when they formally only bind programmers.

* * *

The responses to the Commission’s NPRM overwhelmingly confirm that forced bundling is the most pernicious threat to diverse and independent programming. Despite arguments to the contrary from parties with a vested interest in the *status quo*, conglomerated programmers do not (and cannot) provide meaningful diversity in their bundled programming, and independent programming cannot thrive if it is deprived of access to traditional linear carriage. While ACA believes that, with some refinements, the rules the Commission proposed can be beneficial, failing to address the bundling

⁸² Comcast Comments at 33.

⁸³ 47 U.S.C. § 548(b). A cable operator is defined as one who “provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system.” 47 U.S.C. § 522(5).

⁸⁴ See 47 U.S.C. § 548(c)(2). In addition to the broad language concerning “minimum content of regulations,” the breadth of the regulatory grant is clear from the provision’s bar on activities “the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” 47 U.S.C. § 548(b) (emphasis added). That language indicates that the Commission is not limited to a narrow view of how conduct might negatively impact programming competition or diversity.

that deprives MVPDs of the capacity to carry independent programming would squander what benefits the new proposed rules can provide. ACA urges the Commission to include regulations limiting forced bundling by programmers in the rules adopted through this proceeding.

Respectfully submitted,



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